

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
	:	
DPH HOLDINGS CORP., <u>et al.</u> ,	:	Case No. 05-44481 (RDD)
	:	
Reorganized Debtors.	:	(Jointly Administered)
	:	
-----	X	

AFFIDAVIT OF SERVICE

I, Darlene Calderon, being duly sworn according to law, depose and say that I am employed by Kurtzman Carson Consultants LLC, the Court appointed claims and noticing agent for the Reorganized Debtors in the above-captioned cases.

On October 17, 2013, I caused to be served the documents listed below (i) upon the parties listed on Exhibit A hereto via electronic notification, and (iii) upon the party listed on Exhibit B hereto via postage pre-paid U.S. mail:

- 1) Reorganized Debtors' Reply in Support of Their Motion for Order (I) Enforcing Modification Procedures Order, Modified Plan and Plan Modification Order Injunction Against Curtis J. Duxbury and Carol Duxbury, as Plaintiffs, in New York State Court Personal Injury Action; and (II) Directing Curtis J. Duxbury and Carol Duxbury to Dismiss Action to Recover Upon Discharged and Expunged Claim ("Reply in Support of Duxbury Injunction Motion") (Docket No. 22190) [a copy of which is attached hereto as Exhibit C]
- 2) Reorganized Debtors' Memorandum in Further Support of Sumpter Injunction Motion II (Docket No. 22191) [a copy of which is attached hereto as Exhibit D]

On October 17, 2013, I caused to be served the document listed below upon the parties listed on Exhibit E hereto via overnight mail:

- 3) Reorganized Debtors' Reply in Support of Their Motion for Order (I) Enforcing Modification Procedures Order, Modified Plan and Plan Modification Order Injunction Against Curtis J. Duxbury and Carol Duxbury, as Plaintiffs, in New York State Court Personal Injury Action; and (II) Directing Curtis J. Duxbury and Carol Duxbury to Dismiss Action to Recover Upon Discharged and Expunged Claim ("Reply in Support of Duxbury Injunction Motion") (Docket No. 22190) [a copy of which is attached hereto as Exhibit C]

On October 17, 2013, I caused to be served the document listed below (i) upon the party listed on Exhibit F hereto via overnight mail, and (ii) upon the party listed on Exhibit G hereto via electronic notification:

- 4) Reorganized Debtors' Memorandum in Further Support of Sumpter Injunction Motion II (Docket No. 22191) [a copy of which is attached hereto as Exhibit D]

Dated: October 22, 2013

/s/ Darlene Calderon

Darlene Calderon

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 22nd day of October, 2013, by Darlene Calderon, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature: /s/ Vanessa R. Quiñones

Commission Expires: 10/20/15

EXHIBIT A

Post-Emergence Master Service List

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EXHIBIT C

Hearing Date: October 21, 2013 at 10 a.m. (EDT)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re)	
)	Chapter 11
DPH HOLDINGS CORP., <i>et al.</i> ,)	
)	Case No. 05-44481 (RDD)
)	Jointly Administered
Reorganized Debtors.)	

**REORGANIZED DEBTORS' REPLY IN SUPPORT OF THEIR MOTION FOR ORDER
(I) ENFORCING MODIFICATION PROCEDURES ORDER,
MODIFIED PLAN AND PLAN MODIFICATION ORDER INJUNCTION
AGAINST CURTIS J. DUXBURY AND CAROL DUXBURY, AS PLAINTIFFS,
IN NEW YORK STATE COURT PERSONAL INJURY ACTION;
AND (II) DIRECTING CURTIS J. DUXBURY AND CAROL DUXBURY TO
DISMISS ACTION TO RECOVER UPON DISCHARGED AND EXPUNGED CLAIM**

(“REPLY IN SUPPORT OF DUXBURY INJUNCTION MOTION”)

DPH Holdings Corp. and certain of its affiliated reorganized debtors in the above-captioned cases (collectively, the “Reorganized Debtors”), formerly known as Delphi Corporation (“Delphi”) and certain of its subsidiaries and affiliates, former debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”), submit this Reply in Support of their Duxbury Injunction Motion (the “Motion”) seeking an order (i) enforcing against the plaintiffs in the New York State Court Action¹ this Court’s June 16, 2009

¹ Capitalized but undefined terms used in this Reply have the meanings ascribed to them in the Motion.

Modification Procedures Order, the Modified Plan, and the Court's July 30, 2009 Plan Modification Order Injunction ("Plan Injunction Order") and (ii) directing the plaintiffs to dismiss the action against the Reorganized Debtors to recover upon claims that have been barred, discharged and expunged in these cases.

INTRODUCTION

1. In their Response to the Duxbury Injunction Motion (Docket No. 22183), the Duxburys assert three arguments as to why the Duxbury Injunction Motion should be denied. One, DPH should be deemed to have waived its right to seek a dismissal of the New York State Court Action for failure to argue discharge. Two, Mr. Duxbury never received the Administrative Expense Claim Bar Date Notice. Three, even if the Duxburys should be deemed to have received the Administrative Expense Claim Bar Date Notice, they should be allowed to file a late administrative expense claim on the grounds that it would not be prejudicial to the Reorganized Debtors because they are being defended by an insurance carrier.

2. Each of the Duxburys' arguments in opposition to the Reorganized Debtors' Motion fails. Accordingly, the Reorganized Debtors' Motion should be granted and the Duxburys should be enjoined from pursuing their New York State Court Action and ordered to dismiss it with prejudice.

ARGUMENT

I. Alleged Non-Receipt of Notice Is Insufficient To Rebut The Presumption Of Mailing With Proof Of Service.

3. The Duxburys oppose the Motion on the grounds that Curtis J. Duxbury denies receipt of the Administrative Expense Claim Bar Date Notice. In his affidavit, Mr. Duxbury asserts that he did not receive any documentation in June of 2009 regarding Delphi's bankruptcy

or the Administrative Expense Claim Bar Date of July 15, 2009. *Response to Motion, Affidavit of Curtis J. Duxbury*, ¶ 7 (*Docket No. 22183*).

4. As stated in the Motion, on or before June 20, 2009, Mr. Duxbury was served with due and proper notice of the Administrative Expense Claim Bar Date. *Exhibit B to Motion, Affidavit of Service (Docket No. 17267)*.² In addition, pursuant to the Modification Procedures Order, notice of the Administrative Expense Claim Bar Date was also published in the Detroit Free Press, the New York Times (worldwide), the Wall Street Journal (national, European, and Asian editions) and USA Today (worldwide). Affidavits of Publication are part of the record in this case. (*Docket Nos. 17407-17415*).

5. The federal courts in the state of New York have held “quite uniformly” that an affidavit of non-receipt is insufficient to rebut the presumption of receipt created by proof of mailing. *See In re: AMR Corp.*, 422 B.R. 660, 663-64 (Bankr. S.D.N.Y. 2013); *See also In re: RH Macy Corp.*, 161 B.R. 355, 360 (Bankr. S.D.N.Y. 1993); *In re: Horton*, 149 B.R. 4958 (Bankr. S.D.N.Y. 1992); and *Cable Vision Systems Corp. v. Malandra*, 206 B.R. 667, 673 (Bankr. S.D.N.Y. 1997). Accordingly, the Duxburys’ first argument fails.

II. DPH-DAS Did Not Waive Its Right To Seek the Requested Relief.

6. DPH-DAS has not waived its right to seek to enjoin the Duxburys’ New York State Court Action. While the Duxburys claim that “Delphi . . . never represented . . . that the Duxburys were . . . enjoined from pursuing litigation against” it, this statement is simply untrue.³ DPH-DAS informed the Duxburys, when it presented its affirmative defenses in December 2011,

² Mr. Duxbury received notice of the Administrative Expense Claim Bar Date at the very same address he provided in his summons and complaint in the New York State Court Action.

³ See Declaration of Duane D. Schoonmaker, Counsel for the Duxburys, *Response to Motion*, ¶ 10 (*Docket No. 22183*). Literally, this statement is true, since neither old Delphi nor new Delphi provided the Duxburys with the affirmative defense. But Delphi had no obligation to do so given that neither old nor new Delphi is a party to this action.

that the Duxburys had failed to file a claim in the bankruptcy proceeding and that their claim was discharged.

7. Specifically, in DPH-DAS's Twelfth Affirmative Defense, DPH-DAS states that "[p]laintiffs failed to file a claim in the answering defendant's bankruptcy proceeding and their claims against this defendant were discharged in bankruptcy." *Motion, Exhibit G (Docket No. 22167)*. The very purpose and effect of pleading this affirmative defense in the New York State Court Action was to ensure that the defense was preserved and not waived. *See* C.P.L.R. § 3018(b) ("Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as . . . discharge in bankruptcy, . . . release, res judicata, . . . or statute of limitation."). DPH-DAS's pleading was both proper and timely under New York law, and it therefore necessarily overcomes the Duxburys' arguments of surprise and waiver. *See id.*; *see also Youssef v. Triborough Bridge & Tunnel Auth.*, 24 A.D.3d 661, 661-62; 808 N.Y.S.2d 362 (2005) ("Here, the record fails to demonstrate any factual basis for the plaintiffs' claim of prejudice since the pleaded defense sufficiently provided them with notice of the matters intended to be proved . . .").

8. Plaintiff relies solely on *In re Cobb*, 88 B.R. 119, 120-21 (Bankr. W.D. Tex. 1988) and *In re Bona*, 110 B.R. 1012, 1023 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 11 (S.D.N.Y. 1991), in support of its assertion that DPH has effectively waived its bar date injunction defense. The cases have no bearing on this matter whatsoever. In *In re Bona*, the issue before the court was "how and under what circumstances may a debtor imprisoned under a civil writ for the nonpayment of a debt secure his release after the filing of a Chapter 7 petition." *In re Bona*, 110 B.R. at 1013. *In re Cobb* is equally irrelevant. In that case, the court was faced

with the question of lifting the automatic stay on a state court action where counsel in the state court action never received any notice that the case was on the dismissal docket. *Id.* at *120.

III. No Excusable Neglect Exists to Allow a Late Claim.

9. The Federal Rules of Bankruptcy Procedure provide that

when an act is required or allowed to be done at or within a specified period . . . by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1). Rule 9006 governs the admission of proofs of claim filed after a court-ordered bar date. *In re Enron Corp.*, 419 F.3d 115, 121 (6th Cir. 2005) (citing *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993)). *See also Pioneer*, 507 U.S. at 382 (noting that Rule 9006(b)(1) “empowers a bankruptcy court to permit a late filing if the movant’s failure to comply with an earlier deadline was the result of excusable neglect.”). The Second Circuit has “taken a hard line” in applying the four-part excusable neglect test from *Pioneer*. The elements of that test are (i) the length of the delay; (ii) the danger of prejudice; (iii) the reason for the delay; and (iv) movant’s good faith. *In re Enron*, 419 F. 3d at 122. The Second Circuit, along with other circuits, focuses on the third factor: “‘the reason for the delay’ . . . and the equities will rarely if ever favor a party who fails to follow the clear dictates of a court rule.” *Id.* at 122-123. The four *Pioneer* factors therefore do not carry equal weight, and the excuse given for the late filing has the greatest import. *Id.* at 123.

10. The Duxburys have not made a motion to allow for a late filing, and they have provided no reason in response to the Motion why excusable neglect exists. The reason is that it does not. As stated above, the Duxburys have been on notice of the July 15, 2009 bar date since Mr. Duxbury’s receipt of the Bar Date Notice. In addition, the Duxburys received additional

notice of the need to file a claim in the Bankruptcy Court when they received DPH-DAS's affirmative defenses on December 21, 2011. Four years have passed since the Duxburys first received notice to file a claim. An additional 22 months have passed since they received notice that the claim bar date had passed. Finally, and most importantly, is that the Reorganized Debtors are approximately two months away from closing the last remaining debtor cases. Based on the foregoing, there simply is no conceivable excuse to allow the filing of a late claim, and Second Circuit jurisprudence underscores this reality.

11. Further, the Duxburys' (untrue) assertion that DPH-DAS is being defended by an insurance carrier offers no basis for allowing them to file a late claim. *See Response to Motion, Schoonmaker Declaration, ¶¶ 18-19 (Docket No. 22183) (arguing that the supposed presence of an insurance carrier would negate or minimize the prejudice to DPH-DAS from a late filed administrative claim).* The origin of this allegation is not known but the fact of the matter is that DPH-DAS is not being defended by its insurer. As represented by the Debtors in their Motion for Order Under 11 U.S.C. § 362 and Fed. R. Bankr. P. 7016 and 9019 Approving Procedures for Modifying the Automatic Stay to Allow for (i) Liquidating and Settling and/or (ii) Mediating Certain Prepetition Litigation Claims (Docket No. 4038), under the Debtors' various liability policies, the Debtors had deductible limits, depending on, among other things, the nature of the claim, ranging from \$1 million up to \$5 million. These deductible limits have continued post-emergence and the deductible limit applicable to the Duxbury matter is \$5 million per occurrence. The Duxburys themselves have stated that their alleged damages do not exceed \$1.1 million. *See Exhibit 1, Response to Demand Pursuant to C.P.L.R. § 3017(c).*

12. Therefore, as to any late administrative expense claim the Duxburys would file, the Reorganized Debtors would be 100% exposed. Consequently, the allowance of a late

administrative expense claim would be highly prejudicial to the Reorganized Debtors, and the Duxbury's request, were they to formally make one, should be denied.

13. To the extent that, pursuant to section 524(e) of the Bankruptcy Code, the plan injunction would not bar a suit by the Duxburys against the Reorganized Debtors' insurer under section 3420(a)(1) of the New York Insurance Law ("[t]he insolvency or bankruptcy of the person insured, or the insolvency of the insured's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and *within the coverage of such policy or contract*"), the Reorganized Debtors also would object to the continuation of the state court action against DPH-DAS as a nominal party to fix liability against the insurer for the same reasons as discussed above. Because of the \$5 million deductible limit, the Reorganized Debtors could not escape the burden of defense costs and, as such, the discharge injunction would be rendered meaningless. *In re Jason Pharmaceuticals, Inc.* 224 B.R. 315, 323 (Bankr. Md. 1998) ("This exception to the permanent injunction under *Section 524 (a)* is necessarily conditioned upon the debtor's being exempted from any exposure to personal expense or liability, resulting from the creditor's action, which would imperil its 'fresh start.'"). *See also, Shakir et. al., v. U.S. Leasing International, Inc, et. al.*, 14 Misc. 3d 1208(A); 831 N.Y.S.2d 362 (2006).⁴

⁴ Reference to the New York statute does not suggest the lack of defenses to any such action, as several defenses would clearly exist in favor of the insurance carrier.

CONCLUSION

14. For the reasons set forth above and in the Motion, the Duxburys' New York State Court Action is plainly barred. The Reorganized Debtors therefore respectfully request that this Court grant the Motion and deny any request by the Duxburys to file a late administrative expense claim.

Dated: Detroit, Michigan
October 17, 2013

BUTZEL LONG, a professional corporation

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

CURTIS J. DUXBURY
CAROL DUXBURY

Plaintiff

**RESPONSE TO DEMAND
PURSUANT TO C.P.L.R. 3017(c)**

Index No.: 145259

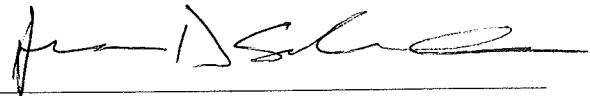
v.

FIRST AMHERST DEVELOPMENT GROUP, LLC
RIDGE LEA ASSOCIATES LLC
DELPHI AUTOMOTIVE SYSTEMS, LLC f/k/a
DELPHI CORPORATION

Defendant

Plaintiffs, for their response to the Demand Pursuant to C.P.L.R. 3017(c) of
Defendant DPH-DAS, LLC, respectfully state that they seek judgment on behalf of Curtis J.
Duxbury in the sum of One Million Dollars (\$1,000,000.00) and judgment on behalf of Carol
Duxbury in the sum of One Hundred Thousand Dollars (\$100,000.00), together with the costs
and disbursements of this action.

Dated: June 21, 2012
Buffalo, New York



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EXHIBIT D

Hearing Date: October 21, 2013 (10:00 a.m.)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re)	
)	Chapter 11
DPH HOLDINGS CORP., <i>et al.</i> ,)	
)	Case No. 05-44481 (RDD)
)	Jointly Administered
Reorganized Debtors.)	

REORGANIZED DEBTORS' MEMORANDUM
IN FURTHER SUPPORT OF SUMPTER INJUNCTION MOTION II

PROCEDURAL HISTORY

1. On February 4, 2009, the Debtors filed a motion (the “Salaried OPEB Termination Motion”) for an order pursuant to 11 U.S.C. §§ 105, 363(b)(1), and 1108 to confirm their authority (or alternatively, authorization, but not direction) to terminate the benefits provided under the Delphi Salaried Health Care Program, the Delphi Salaried Life and Disability Benefits Program and the Delphi Salaried Health Care Program (hereinafter collectively, the “Benefit Plans”). *Salaried OPEB Termination Motion*, ¶ 45 (Docket No. 14705).

2. The Debtors relied on the following reservation of rights language contained in each of the Benefit Plans: “The Corporation reserves the right to amend, modify, suspend or terminate the program in whole or in part, at any time, by action of its Board of Directors or

other committee expressly authorized by the Board to take such action.” *See e.g., Exhibit 3 to Sumpter Injunction Motion II, Delphi Salaried Life and Disability Benefits Program, Article III, Section 3.05(b)(1)* (Docket No. 22138). The Debtors also asserted that Section 1114 of the Bankruptcy Code was inapplicable to the termination of the Benefit Plans as the plans were not vested. *See Salaried OPEB Termination Motion*, ¶¶ 46-47 (Docket No. 14705).

3. Approximately 1,633 objections were filed in opposition to the Salaried OPEB Termination Motion. *See Revised Proposed Fortieth Omnibus Hearing Agenda, Exhibits A – C*. (Docket No. 16326).

4. As explained in greater detail below, Mr. Sumpter was one of the objecting parties. (Docket No. 14898).

5. On February 24, 2009, this Court held a hearing on the Debtors’ *Salaried OPEB Termination Motion*. The relevant excerpts from the hearing are discussed below in Section I.

6. On February 25, 2009, this Court entered its Provisional Salaried OPEB Termination Order in which it ordered in relevant part that “[b]ased on the record at the Hearing, the Debtors’ Salaried OPEB benefits have not vested and the Debtors have reserved the right to modify or terminate Salaried OPEB benefits.” *Provisional Salaried OPEB Termination Order*, ¶ 5 (Docket No. 16380). The Court also exercised its discretionary authority under section 1114 of the Bankruptcy Code to appoint a committee of retired employees (the “1114 Committee”). *Id.* at ¶¶ 8-9. The Court retained jurisdiction to hear and determine all matters arising from the implementation of the provisional order. *Id.* at ¶ 13.

7. On March 6, 2009, the 1114 Committee filed its Supplement And Report In Support Of Motions To Appoint An Official Retiree Committee Pursuant To Section 1114 Of

The Bankruptcy Code And In Opposition To Debtors' Motion To Terminate Salaried Retiree Benefits (the "1114 Committee Report"). (Docket Nos. 16430 and 16431).

8. On March 10, 2009, this Court entered a Modified Bench Ruling On Debtors' Salaried OPEB Termination Motion (the "Modified Bench Ruling") in which the Court summarized the motion as follows:

"The debtors take the position that notwithstanding that the subject matter of these plans involves reimbursing or providing for the reimbursement of 'payments for retired employees and their spouses and dependants, for medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, disability or death,' that their request need not, and should not be governed by Section 1114 of the Bankruptcy Code." *Modified Bench Ruling, pp. 1, 17-24 (emphasis added)* (Docket No. 16443).

9. On March 11, 2009, this Court held a second hearing on the Debtors' *Salaried OPEB Termination Motion*. The relevant excerpts from the hearing are set forth in Section I below. That same day, this Court entered its Final OPEB Termination Order authorizing, but not requiring, the termination of Salaried OPEB Benefits. (Docket No. 16448).

10. On June 16, 2009, the Debtors filed the First Amended Joint Plan of Reorganization of Delphi Corporation And Certain Affiliates, Debtors And Debtors-In-Possession (As Modified) (the "Modified Plan").

11. On July 30, 2009, this Court entered its Order Approving Modifications Under 11 U.S.C. § 1127(b) to (I) First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession, as Modified and (II) Confirmation Order (the "Plan Modification Order") (Docket No. 18707), which confirmed the Debtors' Modified Plan. On October 6, 2009, the effective date of the Modified Plan occurred and the Modified Plan was substantially consummated ("Effective Date"). On that date, the Debtors emerged from chapter 11 as the Reorganized Debtors.

12. Upon the Effective Date of the Modified Plan and Modification Approval Order, a permanent injunction against creditors and other parties in interest was imposed, prohibiting the commencement or continuation of any action to recover any claim against the Debtors that arose on or prior to October 6, 2009.

13. In March 2012, the Reorganized Debtors terminated benefits provided under the Benefit Plans. Among the terminated benefits were disability benefits.

14. In June 2013, Mr. Sumpter filed an action in the United States District Court for the Southern Division of Indiana (the “Indiana Action”), claiming that this Court’s March 11, 2009 Final OPEB Order provided that disability benefits were vested benefits and required the Reorganized Debtors to continue to pay Mr. Sumpter disability benefits until he turns 65.

15. Because Mr. Sumpter’s Indiana Action is based on the erroneous premise that this Court found that disability benefits were vested and that the order required the Reorganized Debtors to continue to pay him disability benefits until he turns 65, the Reorganized Debtors filed the Sumpter Injunction Motion II, so as to enforce the Court’s orders and enjoin the Indiana Action.

16. The Reorganized Debtors assert that the Final OPEB Order (i) does not provide that disability benefits were vested; (ii) does not require the Reorganized Debtors to continue to pay Mr. Sumpter disability benefits until he turns 65; and (iii) provides that disability benefits were not vested.

I. Disability Benefits Were Part of The Salaried OPEB Termination Motion.

17. During the September 26, 2013 hearing on the Reorganized Debtors’ motion to enjoin Mr. Sumpter’s Indiana Action, this Court allowed additional evidence that disability benefits were among the benefits addressed in the Salaried OPEB Termination Motion.

18. The issue of whether salaried retiree benefits provided under the Benefits Plans are modifiable or terminable at-will was briefed, argued and decided by the Court. *See Hearing Transcripts dated February 24, 2009 and March 11, 2009; Modified Bench Ruling on Debtors' Salaried OPEB Termination Motion* (Docket No. 16443); and *Final OPEB Termination Order* (Docket No. 16448). The Court held that all of the benefits under the Benefit Plans were modifiable and terminable at-will and, therefore, not vested, citing in support, *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998).

19. This Court held hearings on February 24, 2009 and March 11, 2009 on the Debtors' Salaried OPEB Termination Motion. During those hearings (i) positions advanced by the parties demonstrate that disability benefits were included in the benefits that the Reorganized Debtors sought to have authority to terminate, (ii) objectors, such as the 1114 Committee and Mr. Sumpter, filed objections which include statements and/or attach documents that reveal that the termination of disability benefits was before this Court, and (iii) this Court made findings and rulings that indicate that it had before it the issue of whether disability benefits were terminable at will and were contemplated by the Salaried OPEB Termination Motion.

20. The following citations confirm that the termination of disability benefits was contemplated in the Salaried OPEB Termination Motion and that the objectors were aware of this fact:

a. During the OPEB Termination Motion hearing on February 24, 2009, Mr. Gloster, counsel for the objectors and the later formed 1114 Committee argued that the Debtors had the burden of proof to establish that "all of these [Benefit Plan] benefits are amendable" and complained that the Reorganized Debtors only put on evidence "about four of them." *February 24, 2009 Hearing Transcript, p. 78:3-14*. Mr. Gloster expressly identified retirees with disability

benefits as a category that he believed should warrant additional attention. *Id.* When this Court inquired whether there were any facts to support that “people who retired on full disability” had “some separate promise”, Mr. Gloster conceded there was not. *Id.* at 78:4-19.

b. During the February 24th hearing, Mr. Butler, counsel for the Debtors, advised this Court that all of the Debtors’ benefit “plans” contain the same reservation of rights language, allowing the Debtors to terminate or modify any of the benefits provided under those plans. And that “no document that has been put in by the objectors and nothing in the record [] suggest[s]” otherwise. *February 24, 2009 Hearing Transcript, p. 113:6-16 (emphasis added)*. Mr. Butler clarified that the OPEB Termination Motion concerned the benefit plans and was not limited to specific benefits under the plans. As Mr. Butler stated: “There are not seventeen other plans that we haven’t put before the Court. These are the plans. These are the plans that the groups participate in. And since Delphi has had them, these plans have consistently and routinely had these reservation of rights in there.” *Id.* at 113:17-21 (emphasis added). It must be noted that, during this colloquy with the Court, a question regarding someone on “disability” was used as an example, thus further demonstrating that the parties understood that disability benefits were one of the benefits covered under the plans at issue. *Id.* at 113:13-21.

c. During the February 24th hearing, Delphi’s Executive Director – Benefits & Policy, Steve Gebbia, testified that “[i]n the [Delphi] summary plan description there is a section that would go to medical or life insurance coverage for employees who retire, for example, under a total and permanent disability retirement.” *Id.* at pp. 41-42.

d. The fact that the 1114 Committee’s charge included disability benefits is evidenced by this Court statement, made toward the end of the February 24th hearing, wherein this Court proposed issuing an order that day granting the motion, “subject to the Court’s review

of the results of a committee appointed for the sole purpose of determining whether any group, such as, for example, those retired on disability would have vested rights.” *Id.* at 123;8-17 (emphasis added).

e. Following the formation of the 1114 Committee, this Court held a second hearing on the Debtors’ Salaried OPEB Termination Motion on March 11, 2009. The 1114 Committee filed a report and a series of exhibits. (Docket No. 16380); *March 11, 2009 Hearing Transcript*, p. 5:6-15.

f. In providing an overview of the “evidence”, or lack thereof, provided by the 1114 Committee in its attempt to establish that plan benefits were vested, Mr. Butler again referenced disabled retirees:

“[t]here’s also, I think important to say, no evidence submitted by the retirees committee that would support the suggestion made in the prior record that somehow people who were disabled were treated differently or specially or there were promises made or any other allegations made on the record about a disabled class. That was one of the classes that was - - or groups that was identified at the prior hearing. And the reason nothing was submitted by the retirees’ committee is because, as Delphi indicated at the prior hearing, there is no different plan for disabled parties. They participate in the plans that have the same reservations that everybody else does.” *March 11, 2009 Hearing Transcript*, p. 23:7-18 (emphasis added).

This reference plainly shows that the question of terminating all of the benefits of disabled retirees was before this Court on the Salaried OPEB Termination Motion.

g. At the end of the March 11th hearing, this Court made several rulings. Critical to this motion, and relying on the Sixth Circuit’s *Sprague* decision, the Court found that “all of Delphi’s plans and all of GM’s plans, at least since 1985, contained a clear and unambiguous reservation of the right to terminate, or plan documents contain such reservation . . .” and “that debtors have met their burden, which as I stated in my modified ruling

is substantial, to show that the salaried OPEB benefits for these retirees are also modifiable or terminable at will.” *March 11, 2009 Hearing Transcript, pp. 62 and 64 (emphasis added)*. Notably, the Court went on to state that “in light of” the Debtors having met their burden, and in “the absence of any other evidence” that any particular group, such as “people on disability . . .” should be excluded from the order, the Debtors’ motion was granted. *Id. at p. 64*.

h. The 1114 Committee argued that disability benefits were vested benefits in their brief in opposition to the Debtor’s motion and included disability benefits provisions as exhibits:

i. On page 23 of the 1114 Committee’s brief in opposition, the committee cited the following language from the 1980 SPD in support of their objection: “Monthly total and permanent disability benefits payable for life under the Retirement Program.” *See Supplement And Report In Support of Motions To Appoint An Official Retiree Committee Pursuant To Section 114 Of The Bankruptcy Code And In Opposition To Debtors’ Motion To Terminate Salaried Retiree Benefits, p. 23* (Docket No. 16430);

ii. On page 26, the 11 Committee argued that the annual Personal Benefit Summary, “which described each employees’ [sic] . . . Disability Income” included “statements representing that as retirees they would each have vested benefits.” *Id. at 26*.

iii. Exhibits A, B and C to the 1114 Committee’s brief in opposition included the disability benefits provisions, with no reference or mention of their exception.

21. As stated above, Mr. Sumpter personally filed an objection to the Salaried OPEB Termination Motion, within which he objected to the termination of his disability benefits. (Docket No. 14898).

22. In his objection, Sumpter expressly brought before this Court an “object[ion] to Delphi’s efforts to terminate its obligations as it pertain[ed] to any part of [his] retirement benefits” and asserted that Delphi had “no specific right to change ... disability benefits”. *Id.* at pp. 5-6 (emphasis added). Sumpter’s Objection also attached a page from the Delphi Summary Plan Description regarding “Life and Disability Benefit Coverages.” *Id.* at Document 2.

II. The Final Salaried OPEB Termination Order Does Not Provide That SEDB Benefits Were Vested And Does Not Require The Payment Of SEDB Benefits Through Age 65.

23. In his Complaint¹, Mr. Sumpter incorrectly claims that this Court’s Final Salaried OPEB Termination Order (“Final OPEB Order”) (Docket No. 16448) orders that disability benefits provided under the Delphi Salaried Life and Disability Benefits Program (the “Benefit Plan”) were vested benefits. *Complaint*, ¶ 11. Mr. Sumpter further erroneously alleges that the Final OPEB Order required DPH to pay SEDB Benefits² until he turned 65. *Complaint*, ¶ 24(a). As shown below, three of the six counts in Sumpter’s Complaint expressly reference this Court’s Final OPEB Order as the basis for his erroneous claims:

a. In his First Cause of Action, “For Termination of Vested ERISA Disability Benefits”, Sumpter expressly states that the relief sought is for DPH’s “violation of Bankruptcy Court (SDNY) OPEB Order” and resulting failure to pay SEDB Benefits. *Complaint*, ¶¶ 24 and 24(a).

b. In the Second Cause of Action, “Civil Conspiracy To Terminate Plaintiff’s [SEDB Benefits] In Violation of Bankruptcy Court Order, Mail Fraud And Extortion”, Sumpter expressly cites to this Court’s Final OPEB Order, seeking “relief for DPH’s willful violation of

¹ Complaint means the complaint filed in the United States District Court, Southern District of Indiana, *Sumpter v. DPH Holding Corp., et. al.*, 1:13-cv-1024 WTL-TAB (June 26, 2013).

² “SEDB Benefits” are defined as supplemental extended disability benefits provided under the Benefit Plan.

the Honorable Robert D. Drain's [Final OPEB Order] regarding payment of Plaintiff's SEDB benefits . . . and fail[ing] to disclose the existence of the court order requiring payment of . . . [SEDB Benefits]." *Complaint*, ¶¶ 29 and 29(a)).

c. In the Sixth Cause of Action, "Civil Conspiracy To Illegally Terminate [SEDB Benefits] In Violation Of ADA And Conspiracy To Interfere With Plaintiff's Civil Rights", Mr. Sumpter falsely asserts, contrary to this Court's prior findings, that "[t]he disability benefits . . . were vested" *Complaint*, ¶ 55.

24. Mr. Sumpter's Fourth and Fifth Counts are premised on his assertion that the disability benefits provided under the Benefit Plan were vested.

25. Mr. Sumpter relies on Paragraph 4 of the Final OPEB Order for his assertions that the SEDB Benefits were vested and that this Court ordered that the benefits be paid until he turned 65. Paragraph 4 of the Final OPEB Order provides as follows:

The Debtors shall continue to provide benefits for claims incurred by each Eligible Salaried Employee through the cessation date of such retiree's participation in the applicable welfare plan, provided that such retiree has timely paid all requisite contributions for the applicable plan, and provided further that such retirees shall not be required to file proofs of claim in this Court to implement the terms of this decretal paragraph. *Final OPEB Order*, ¶ 4.

26. Neither Paragraph 4 nor any other provision of the Final OPEB Order provides that SEDB Benefits were vested. Likewise, it plainly does not require DPH to pay Mr. Sumpter SEDB Benefits until age 65.

27. Moreover, this Court expressly found that the benefits contained in the Benefit Plan, which include SEDB Benefits, were not vested benefits and therefore could be modified or terminated at will. *Modified Bench Ruling On Debtors' Salaried OPEB Termination Motion* (Docket No. 16443). This Court found as follows:

“the benefit plan documents, including the summary plan descriptions, or SPDs, and the absence of any evidence in this record that would indicate that the debtors otherwise promised, or the debtors’ predecessors otherwise promised, to the beneficiaries of those plans who are affected by this motion, that notwithstanding the language in the Delphi plan documents, those plans are not modifiable at will. The only evidence that has been submitted to counter the language in the Delphi plan documents (including the SPDs) pertains to the plans of GM Corporation, the debtors’ predecessor. Those documents, however, all predate the decision of the Sixth Circuit in *Sprague v. General motors Corp.*, 133 F.3d 388 (6th Cir. 1988), which found GM’s plan to be modifiable. Given that record, it appears to me that the debtors have very clearly made the showing that they have the right to modify the plans at will.” *Id.* at p. 16-17 (emphasis added).

28. There is no plausible interpretation that can be given to paragraph 4 to conclude that it conveyed vested rights to disability benefits. Nothing whatsoever in the record supports the interpretation that Mr. Sumpter advances. To the contrary, the record is replete with evidence and findings that point in one direction only: the Benefit Plan under which Mr. Sumpter received disability benefits was, like the other plans addressed in the OPEB Termination Motion, terminable at will. The content of the Final OPEB Order is the antithesis of Mr. Sumpter’s contention.

29. The reason paragraph 4 is in the OPEB Order is straightforward and immaterial to the claim Mr. Sumpter asserts in the Indiana action. The explanation is found in the March 11, 2009 hearing transcript at pages 52 through 54. There, Mr. Butler, counsel for the Debtors, explains the origin of the paragraph; it is the product of a discussion with counsel for the 1114 Committee. The point of paragraph 4 was to create a mechanism that would obligate the Debtors to pay claims through coverage dates (*i.e.*, the time prior to termination of the plan) without imposing on the retirees an obligation to file a proof of claim. Counsel for the 1114 Committee made no objection to Mr. Butler’s recital and nothing whatsoever was said or intimated that

paragraph 4 was intended to create vested rights where none previously existed in the benefit plan or otherwise.

III. This Court's Jurisdiction Over This Matter

30. Generally, the Bankruptcy Court has exclusive jurisdiction over “core” proceedings. *In re Birting Fisheries, Inc.*, 300 B.R. 489 (9th Cir. 2003) (citing *In re Gruntz*, 202 F. 3d 1074 (9th Cir. 2000)). “[A] bankruptcy court’s original core jurisdiction ‘continues’ in order for it to enforce its orders, even after the case has been closed.” *Id.* at 499 (citing *Peacock v. Thomas*, 516 U.S. 349, 356 (1996)). “A federal court always has subject matter jurisdiction “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and to *effectuate its decrees.*” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994) (emphasis added). Here, the Debtors’ Salaried OPEB Termination Motion was a core proceeding during which this Court made several findings upon which the Final OPEB Order is based.

31. Additionally, “where bankruptcy court jurisdiction has been expressly retained, it will be construed as exclusive, so as not to render the provision a nullity.” *In re Birting Fisheries, Inc.*, 300 B.R. at 499 (citing *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999)). Pursuant to Section 13 of the Modified Plan, entitled Retention of Jurisdiction, **this Court retained “exclusive jurisdiction** of all matters arising out of, and related to, the Chapter 11 Cases and this Plan, **including . . . any dispute** relating to any liability arising out of . . . **the termination of any** employee or **retiree benefit program, regardless of whether such termination occurred prior to or after the Effective Date.**” *Modified Plan*, § 13(p) (emphasis added).

32. This Court has jurisdiction to order that Mr. Sumpter is collaterally estopped from pursuing the claims against the Reorganized Debtors in the Indiana Action. *In re Texaco, Inc.*, 505 Fed. Appx. 77; 2012 U.S. App. LEXIS 25853 (2d Cir. 2012) is particularly instructive. In that case, appellant Kling Realty Company and others (“Kling”) appealed a judgment of the United States District Court affirming this Court’s order which (1) found that all claims asserted by Kling against Texaco in Louisiana state court were discharged by the Bankruptcy Court’s confirmation order; (2) directed Kling to dismiss all such claims; and (3) enjoined Kling from pursuing those claims. In its appeal, Kling contended that the Bankruptcy Court lacked subject-matter jurisdiction to dismiss claims arising after the plan confirmation date. *Texaco*, 505 Fed. Appx. at 78-79. The Second Circuit affirmed the Bankruptcy Court’s findings that Kling’s Louisiana state court tort claims arose before the Petition Date and were discharged by the confirmation order. The Second Circuit found that Kling had forfeited the right to assert that the subject pre-and post-confirmation clean-up operations were separate and distinct because Kling had framed Texaco’s tortious activity as a failure to restore the property to its original condition. *Texaco*, 505 Fed. Appx. at 79. Further, even if Kling hadn’t forfeited the argument, the court concluded that the property was already in the shape that it was in pre-confirmation, so it was irrelevant when the clean up work occurred.

33. The reasoning in *Texaco* is applicable here. First, like in *Texaco*, because Mr. Sumpter has based his entire Indiana Action on paragraph 4 of this Court’s Final OPEB Order, which was a pre-confirmation order, Sumpter has forfeited any right to now assert that his Indiana Action is based on post-confirmation action. Second, like in *Texaco*, the underlying subject matter has not changed pre-confirmation to post-confirmation. In *Texaco*, the property was already in the shape that it was in pre-confirmation. Here, the benefit plan that contains the

disability benefits is the exact same benefit plan that was before this Court on the Debtors' Salaried OPEB Termination Motion. In other words, the benefit plan "was already in the shape that it was in pre-confirmation", just like the property in *Texaco*. This Court has already found, as stated above, that the benefit plan language gave the Debtors the right to modify the plans at will. *See Modified Bench Ruling, pp. 16-17.*

34. Accordingly, like in *Texaco*, this Court has jurisdiction to dismiss all of Sumpter's Indiana Action claims and enjoin him from pursuing those claims. As the Second Circuit stated in *Texaco*, "[a] bankruptcy court retains post-confirmation jurisdiction in a chapter 11 proceeding . . . to the extent provided in the plan of reorganization." Here, as cited above, the Modified Plan provided that this Court retained jurisdiction, *inter alia*, to resolve any disputes arising out of the termination of any retiree benefit plans, even if the termination occurred after the plan effective date.

35. Further, this Court's ability to enjoin Mr. Sumpter from proceeding on his claims in Indiana based on the doctrine of issue preclusion, more specifically collateral estoppel, is supported by the First Circuit opinion in *Monarch Life Insurance Company v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995). There, the law firm of Ropes & Gray sought to enjoin a state court proceeding brought by Monarch Life Insurance Co. alleging legal malpractice. Ultimately the First Circuit agreed that the action could not proceed because issues decided in the bankruptcy proceeding operated to collaterally estop Monarch.

36. *Monarch* therefore provides authority for the proposition that this Court has jurisdiction to enjoin a post-confirmation action, such as the action brought by Mr. Sumpter. The issue that is at the core of Mr. Sumpter's Indiana action was decided when this Court entered its

Modified Bench Ruling and Final OPEB Order: the Benefit Plan under which disability benefits were paid was terminable at will.

37. To be collaterally stopped from relitigating an issue that was adjudicated in a prior action, the following must be present: (1) the issue sought to be precluded must be the same as the one involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment.” *In re Contempri Homes, Inc.*, 247 B.R. 135, 138 (M.D. Pa. 2000).

38. All of the elements are satisfied here: (1) the issue of whether disability benefits were vested was involved in the prior action. This Court found that the benefit plan under which disability benefits were paid was terminable at will; (2) that issue was actually litigated; (3) this Court entered a valid and final judgment; and (4) the determination that the benefit plan was terminable at will was essential to the prior judgment.

CONCLUSION

39. For the reasons advanced in the Reorganized Debtors’ principal motion and brief and this supplemental memorandum, the Reorganized Debtors ask this Court to grant the relief requested in their motion.

Dated: Detroit, Michigan
October 17, 2013

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